U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 October 2003

No. 2002-BLA-05280

In the Matter of:
TILMAN BROCK,
Claimant,

v.

NALLY & HAMILTON ENTERPRISES,
Employer,
and
AMERICAN INTERNATIONAL COMPANY,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
Edmond Collett, Esq.
On behalf of Claimant

Stuart Poage, Esq.
On behalf of Employer/Carrier

Joseph Luckett, Esq.
On behalf of Director, OWCP

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

DECISION AND ORDER – DENIAL OF BENEFITS

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of

the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[1]

On July 2, 2002, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs ("OWCP"), for a hearing. (DX 21).[2] A formal hearing on this matter was conducted on January 22, 2002, in Benham, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES

The issues in this case are:

1. Whether the claim was timely filed;

2. Whether the person upon whose disability this claim is based is a miner;

3. Whether the miner worked as a miner after December 31, 1969;

4. Whether the miner worked at least 27 years in or around one or more coal mines;

5. Whether the Miner has pneumoconiosis as defined by the Act;

6. Whether the Miner's pneumoconiosis arose out of coal mine employment;

7. Whether the Miner is totally disabled;

8. Whether the Miner's disability is due to pneumoconiosis;

9. Whether the named employer is the responsible operator;

[1]The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr" refers to the official transcript of this proceeding.

10. Whether the evidence establishes a change in conditions and/or that a mistake in determination of any fact in the prior denial under § 725.310; and[1]

11. Whether the instant claim is not barred by the doctrines of res judicata and collateral estoppel.

(DX 21). The issues of whether the miner's most recent period of cumulative employment of not less than one year was with the named responsible operator, whether the regulations are Constitutional, whether the responsible operator is liable for medical and legal expenses, the unavailability of comparable work, and whether the medical tests meet regulatory standards were raised for appellate purposes.

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

Tillman Brock ("Claimant") was born on January 15, 1957; he was 46 at the time of the hearing. (DX 1). He married Sheila Ann (Wilson) Brock on September 8, 1979. (DX 6). Chastity Brock was born to Tillman and Sheila Brock on December 6, 1980; Amanda Brock was born on July 18, 1983; and Jonathan Brock was born on July 11, 1989. (DX 7). As of April 25, 2001, Chastity Brock was attending school full-time from August of 2001 through May of 2002. (DX 8). At the hearing, Claimant testified that both of his children who were over the age of 18 were full-time college students. (Tr. 13). Claimant also testified that he and his wife live together. (Tr. 14). Therefore, I find that Claimant has established four dependents for the purposes of augmentation.

On his application for benefits, Claimant marked that he had never filed a Federal Black Lung benefits claim before. (DX 1). He alleged 27 years of coal mine employment, stopping on November 23, 1999 because he was very short-winded, difficulty sleeping at night due to smothering, and occasional episodes of coughing and wheezing at night.

Claimant described the exertional requirements of his work as an equipment operator from 1972 until 1999 as requiring him to sit for 8-12 hours per day and to lift 25 pounds several times per day. (DX 3).

[3] Modification is not an issue for adjudication even though it is contested by Employer. Claimant timely requested a formal hearing following the denial of his initial claim for benefits under the Act by the District Director. Accordingly, this matter will not be adjudicated under the standard set forth at § 725.310, nor will the question of whether the doctrines of collateral estoppel or res judicata apply be adjudicated. Surely, Employer must have mistakenly listed these two issues as contested issues.

Procedural History

Claimant filed an application for benefits under the Act on April 2, 2001. (DX 1). The OWCP identified Nally & Hamilton Enterprises, Inc. as the putative responsible operator on June 20, 2001. (DX 14). On October 24, 2001, the OWCP issued a schedule for the submission of additional evidence. In the schedule, the OWCP finds that based on the currently record of medical evidence, Claimant would not be entitled to benefits because he could not establish that he was totally disabled or that he was totally disabled due to pneumoconiosis. (DX 17). January 22, 2002 was set as the last date for the submission of additional medical evidence. On March 21, 2002, the District Director issued a proposed decision and order denial of benefits. The District Director found that the evidence established the existence of pneumoconiosis arising out of coal mine employment, but failed to establish that Claimant was totally disabled due to pneumoconiosis. On March 25, 2002, counsel for Claimant requested a formal hearing. (DX 19). On July 2, 2002, this matter was transferred to the Office of the Administrative Law Judges for a formal hearing. (DX 21).

Length of Coal Mine Employment

The length of coal mine employment must be computed as provided by § 725.101(a)(32). *See* § 718.301. Under § 725.101(a)(32), a year is defined as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 working days. § 725.101(a)(32) (internal quotation marks omitted). The determination of length of coal mine employment must begin with § 725.101(a)(32)(ii), which directs an adjudication officer to ascertain the beginning and ending dates of coal mine employment by using any credible evidence. If credible evidence establishes that the miner's coal mine employment lasted for a year, it shall be presumed, in the absence of contrary evidence, that the miner spent at least 125 working days in such employment. § 725.101(a)(32)(ii). However,

> [i]f the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

§ 725.101(a)(32)(iii). The Board recently addressed the use of the BLS table in calculating the length of a miner's coal mine employment for the purposes of determining the proper responsible operator. *See Clark v. Barnwell Coal Company*, __ B.L.R. __, BRB Nos. 01-0876 BLA and 02-0280 BLA (April 30, 2003). After acknowledging that any reasonable method of calculation for determining the length of coal mine employment may be used, the Board found the use of the BLS table to find a period of coal mine employment of more than one year based on an aggregate calculation of days worked during a combination of four years to not be reasonable for the purposes of determining the responsible operator under prior version of § 725.493. *See id*. The Board specifically held, "that for the purposes of the threshold one-year requirement, proof

that a miner's earnings exceeded the average 125-day earnings reported by BLS for a given year does not, in and of itself, establish that the miner worked for one calendar year." *See id*.

Previously, when determining the length of coal mine employment, an administrative law judge could apply any reasonable method of calculation. *See Croucher v. Director, OWCP*, 20 B.L.R. 1-67, 1-72. There are several sources of credible evidence. First, an administrative law judge may rely solely upon an uncorroborated history of coal mine employment form completed by the miner as the basis for a finding of length of coal mine employment. *See Harkey v. Alabama-By-Products Corp.*, 7 B.L.R. 1-26 (1984). A miner's own testimony, if it is uncontradicted and credible, may also be the exclusive basis for a finding on the length of miner's coal mine employment, especially when the Social Security Earnings statement is incomplete. *See Bizarri v. Consolidation Coal Co.*, 7 B.L.R. 1-343 (1984); *Coval v. Pike Coal Co.*, 7 B.L.R. 1-272 (1984). If the miner's testimony is unreliable, it is proper for an administrative law judge to credit the Social Security records over the miner's testimony. *See Tackett v. Director, OWCP*, 6 B.L.R. 1-839 (1984).

Claimant completed a coal mine employment length form. (DX 2). He noted that he began working as a coal truck driving for Herb Woolum Trucking from October 1972 until April 1973. From April 1973 until October 1975, Claimant was a coal truck driver for Harry Philpot Trucking. Claimant then drove a coal truck from October 1975 until October 1976 for Melvin Roop Trucking. He noted that he was employed from October 1976 until September 1989 for Straight Creek Mining as a heavy equipment operator. Claimant then worked for Andalex Resources as a heavy equipment operator from September 1989 until April 1991. From April 1991 until November 1999 Claimant worked as a heavy equipment operator for Nally & Hamilton Enterprises.

Claimant's Social Security Earnings Record show three quarters of employment with Harry Philpot in 1974 and one quarter of employment there in 1975. (DX 4). In 1975, there are four quarters of wages reported by Herbert Woolum, followed by the first two quarters of wages reported for 1976. There is one quarter of wages reported by Roop Trucking for the third quarter of 1976. Claimant's records then show employment in the fourth quarter of 1976 with Straight Creek Mining Company, followed by substantial earnings representing full-time employment with Straight Creek Mining from 1977 through 1989. Wages evidencing a partial year of employment with Andalex Resources in 1989, full-time employment in 1990, and then partial employment in 1991 are reported. After partial year employment wages were reported by Nally & Hamilton Enterprises for 1991, wages representative of a full year of employment were reported from 1992 through 1999.

At the hearing, Claimant testified that the coal hauling he did for Herbert Woolum occurred at nights and during the summers while he was in high school. (Tr. 15). He was initially a truck driver for Straight Creek Mining, and then he was trained to be an equipment operator. (Tr. 19,20). After he left Straight Creek, Claimant testified that he worked for Andalex Resources, where he switched off between operating a dozer in surface mining and operating a loader loading overburden in an area adjacent to the coal mining pit where he was still exposed to coal dust. (Tr. 25-27). After Andalex, Claimant worked for Nally & Hamilton as an equipment operator from 1991 until the day before Thanksgiving in 1999. (Tr. 28). He testified that he worked over 27 years in coal mine employment when accounting for the summer

months he worked during high school. (Tr. 32). Claimant stated that he received cash when working during high school. (Tr. 33).

Claimant engaged in coal mine employment hauling coal for Herbert Woolum during the summers of 1972 and 1973. The definition of "miner" found in the Act includes any individual who has worked in transportation in or around a coal mine.§ 725.101(a)(19). I credit Claimant with one-half of a year of coal mine employment for those two summers. Claimant's testimony, coal mine employment length form, and Social Security Earnings record are conflicting with regard to the dates for his employment with Herbert Woolum and Harry Philpot from 1974 through the third quarter of 1976. However, the three documents provide substantial evidence that Claimant was engaging in coal mine employment during that period. Thus, I credit Claimant with two years of coal mine employment from 1974 through the third quarter of 1976. Claimant engaged in full-time coal mine employment with Straight Creek Mining from the fourth quarter of 1976 through the third quarter of1989, which amounts to thirteen years of coal mine employment. Claimant worked for Andalex Resources from the fourth quarter of 1989 through the first quarter of 1991, for which I credit Claimant with one and one-half years of coal mine employment. Claimant then worked for eight and three-fourth years with Nally & Hamilton Enterprises. In sum, I find that Claimant has engaged in coal mine employment for twenty-five and three-fourth years of coal mine employment.

Based on his work as a truck driver hauling coal and his work as a heavy equipment operator engaged in surface mining, I find that Mr. Brock was a coal miner within the meaning of § 402(d) of the Act and § 725.202 of the regulations. Mr. Brock engaged in coal mine employment after December 31, 1969.

Responsible Operator

Liability under the Act is assessed against the most recent operator which meets the requirements of §§ 725.494 and 725.495. The District Director identified Nally & Hamilton Enterprises as the putative responsible operator. (DX 14). Claimant engaged in coal mine employment for Nally & Hamilton Enterprises from April 1991 until November 1999. Claimant last engaged in coal mine employment in November 1999. Nally & Hamilton Enterprises is the employer with whom Mr. Brock spent his last cumulative one year period of coal mine employment and is properly designated as the responsible operator in this case. §725.493(a)(1).

MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. The claimant and responsible operator are entitled to submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas studies, no more than one report of each biopsy, and no more than two medical reports. § 725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be

admissible under § 725.414(a)(2)(i) and (3)(i) or paragraph § 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of §§ 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by the miner under § 725.414. § 725.406(b).

Claimant selected Imtiaz Hussain, M.D. to perform his Department of Labor sponsored examination. (DX 8). Claimant's evidentiary submissions comply with the limitations set forth at § 725.414(a)(2)(i). Employer's evidentiary submissions comply with the limitations set forth at § 725.414(a)(3)(i).

X-RAY REPORTS

Exhibit	**Date of X-ray**	**Date of Reading**	**Physician/Qualifications**	**Interpretation**
DX 12	7/11/01	7/11/01	Baker	1/0
EX 1	7/11/01	9/17/01	Barrett, BCR[2], B-reader[3]	negative
DX 10	7/18/01	7/18/01	Hussain	1/0
DX 11	7/18/01	8/08/01	Sargent, BCR, B-reader	Film quality 1
EX 3	7/18/01	12/1/02	Spitz, BCR, B-reader	negative
EX 2	7/18/01	10/19/02	Wiot, BCR, B-reader	negative

[4]A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

[5]A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

PULMONARY FUNCTION STUDIES

Exhibit/ Date	Co-op./ Undst./ Tracings	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Qualifying Results
DX 12 7/11/01	/ / Yes	44 74”	5.24	5.96	115	88%	No
DX 10 7/18/01	Good/ Good/ Yes	44 72"[4]	5.13	5.88	84	87%	No
EX 3 11/26/02	/ / Yes	45 73”	5.30	5.85		91%	No

*post-bronchodilator values

ARTERIAL BLOOD GASES

Exhibit	Date	pCO_2	pO_2	Qualifying
DX 12	7/11/01	37	76	No
DX 10	7/18/01	36.1 34.6*	77.0 72.0*	No No
EX 3	11/26/02	37.0	80.0	No

*Results obtained with exercise

Narrative Medical Evidence

Glen Baker, M.D., who is board-certified in internal medicine and the subspecialty of pulmonary disease, examined Claimant on July 11, 2001 and completed a Kentucky Workers' Compensation Medical Report form. (DX 12). Dr. Baker noted that Claimant had a 25 year history of coal mine employment in surface mining and that Claimant was a non-smoker. Claimant complained of difficulty breathing the past 2-3 years, primarily with dyspnea on

[6] I must resolve the height discrepancy recorded on the pulmonary function tests. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). I find that the miner's actual height is 73 inches.

exertion. Claimant also complained of cough, sputum production, and wheezing. Upon clinical examination, Claimant's lungs were clear with no rales or wheezes. Dr. Baker conducted a chest x-ray interpretation, a pulmonary function test ("PFT"), and an arterial blood gas study ("ABG"). Dr. Baker interpreted the chest x-ray as positive for pneumoconiosis. He found the PFT to be normal and the ABG to reveal mild resting arterial hypoxemia. Dr. Baker diagnosed coal workers' pneumoconiosis ("CWP") based on an abnormal x-ray and significant history of dust exposure. He also diagnosed mild resting arterial hypoxemia based on the ABG and chronic bronchitis based on Claimant's history. Dr. Baker opined that Claimant's pneumoconiosis was due to coal dust exposure because his chest x-ray evidence is consistent with pneumoconiosis and there is no other condition to account for the x-ray changes. Dr. Baker also opined that any pulmonary impairment Claimant suffers from would be caused, at least in part, by coal dust exposure, noting that Claimant is a non-smoker.

Imtiaz Hussain, M.D. examined Claimant on July 18, 2001. (DX 10). Dr. Hussain reviewed the length of coal mine employment form completed by Claimant. He noted that Claimant had no history of smoking cigarettes. Claimant complained of a cough productive of sputum, wheezing, dyspnea, and ankle edema. Upon auscultation of Claimant's lungs, Dr. Hussain detected no added sounds. He conducted a chest x-ray, PFT, ABG, and an EKG. He interpreted the chest x-ray as revealing congestive heart failure and mild pneumoconiosis. He found the PFT to be normal and the ABG to show hypoxemia. He found the EKG to be normal. Dr. Hussain diagnosed congestive heart failure and pneumoconiosis. He attributed Claimant's diagnosis of congestive heart failure to hypertension and his diagnosis of pneumoconiosis to dust exposure. Dr. Hussain found that Claimant has a mild pulmonary impairment. He attributed 80% of Claimant's impairment to congestive heart failure and 20% to pneumoconiosis. Dr. Hussain stated that his diagnosis of pneumoconiosis was based on his chest x-ray findings and Claimant's history. Dr. Hussain concluded that Claimant retained the respiratory capacity to perform the work of a coal mine or comparable work in a dust-free environment.

N.K. Burki, M.D. examined Claimant on November 26, 2002. (EX 4). Claimant complained of shortness of breath for the past 3 to 4 years, as well as a history of cough with sputum production. Dr. Burki noted that Claimant is a life-long non-smoker. He also considered a 25 year history of surface coal mine employment. Physical examination of Claimant's respiratory system was normal. Dr. Burki conducted a chest x-ray, PFT, and ABG. He found the x-ray to be negative for pneumoconiosis. He concluded that the PFT showed normal lung volumes and normal diffusing capacity. He also found the ABG to be normal. Based on his examination and information sent by counsel for Employer, Dr. Burki found no evidence of pneumoconiosis or pulmonary function deficit. Dr. Burki concluded that Claimant retains the pulmonary capacity to perform the work of a coal miner or comparable work in a dust-free environment.

Smoking History

The evidence establishes, and I find, that Claimant was a non-smoker.

DISCUSSION AND APPLICABLE LAW

Mr. Brock's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, the following elements:

1. That he suffers from pneumoconiosis;

2. That the pneumoconiosis arose, at least in part, out of coal mine employment;

3. That the claimant is totally disabled; and

4. That the total disability is caused by pneumoconiosis.

See §§ 719.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore*, 9 B.L.R. 1-4, 1-5 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-212 (1985). Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26, 1-27 (1987).

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Pneumoconiosis is defined by the regulations:

> For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
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> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

Section 718.201(a).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. The record consists of six interpretations of two chest x-rays. Dr. Baker interpreted the x-ray dated July 11, 2001 as positive. Dr. Barrett, who is dually-certified as a B-reader and a radiologist, interpreted the film as negative. I accord greater probative weight to the interpretation of Dr. Barrett based on his credentials. Thus, I find that the July 11, 2001 film is negative for the existence of pneumoconiosis. Dr. Hussain interpreted the film dated July 18, 2001 as positive. Dr. Sargent, a dually-certified physician found the film to be of acceptable quality for rendering an interpretation. Drs. Spitz and Wiot, both of whom are dually-certified physicians, found the film to be negative. I accord greater weight to the interpretations of Drs. Spitz and Wiot based on their credentials. Therefore, I find that the film dated July 18, 2001 is negative for the existence of pneumoconiosis. I have determined that both chest x-rays were negative for the existence of pneumoconiosis. Therefore, I find that the Claimant has not established the existence of pneumoconiosis by x-ray evidence under subsection (a)(1).

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. There is no biopsy evidence to consider. Therefore, I find that the Claimant has failed to establish the existence of pneumoconiosis through biopsy evidence under subsection (a)(2).

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

§ 718.202(a)(4).

This section requires a weighing of all relevant medical evidence to ascertain whether or not the claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

Dr. Baker diagnosed CWP based on an abnormal x-ray and significant history of coal dust exposure. The Sixth Circuit Court of Appeals has held that merely restating an x-ray is not a reasoned medical judgment under § 718.202(a)(4). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). The Board has also explained that, when a doctor relies solely on a chest x-ray and coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his opinion "merely a reading of an x-ray . . . and not a reasoned medical opinion." *Taylor v. Brown Bodgett, Inc.*, 8 B.L.R. 1-405 (1985). *See also Worhach v. Director, OWCP* , 17 B.L.R. 1-105, 1-110 (1993)(citing *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113 (1989)(it is permissible to discredit the opinion of a physician which amounts to no more than a restatement of the x-ray reading). Dr. Baker's opinion does not constitute a reasoned medical judgment under subsection (a)(4). Dr. Baker's narrative opinion cannot support a finding of pneumoconiosis.

Dr. Hussain opined that Claimant suffered from pneumoconiosis based on his chest x-ray findings and Claimant's history. Dr. Hussain's opinion does not constitute reasoned medical judgment under subsection (a)(4) because it is merely a chest x-ray restatement without any reasoning identifying why Claimant's history led to his diagnosis. Dr. Hussain's narrative opinion cannot support a finding of pneumoconiosis under subsection (a)(4).

Dr. Burki opined that he found no evidence to justify a diagnosis of CWP. He performed a physical examination and submitted Claimant to a PFT and ABG. He interpreted a chest x-ray as negative for pneumoconiosis. Dr. Burki considered an adequate account of Claimant's non-smoking history and coal mine employment history. He set forth clinical observations and findings, and his reasoning is supported by adequate data. His opinion is reasoned and documented. I find that Dr. Burki's opinion is entitled to probative weight.

The record does not contain a reasoned medical opinion finding the existence of pneumoconiosis. Moreover, Dr. Burki opined that Claimant does not suffer from pneumoconiosis. I find that Claimant has not established the existence of pneumoconiosis under subsection (a)(4).

Claimant has not established the existence of pneumoconiosis under any applicable section of § 718.202. Therefore, I find that Claimant has not established the existence of pneumoconiosis.

Total Disability

To prevail, Claimant must also demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under Section 718.204(b), all relevant probative evidence, both "like" and "unlike" must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

I find that Claimant has not established that Miner suffered from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. The three pulmonary function tests failed to produce qualifying values. Therefore, I find that Claimant has not established the existence of total disability under subsection (b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) by the results of arterial blood gas studies. The three arterial blood gas studies of record failed to produce qualifying values. Therefore, I find that Claimant has not established the existence of total disability under subsection (b)(2)(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. There is no evidence regarding cor pulmonale with right-sided congestive heart failure to consider. Therefore, I find that Claimant has not established the existence of total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented miner from engaging in his usual coal mine employment or comparable gainful employment. Claimant's usual coal mine employment involved operating heavy equipment, which required him to sit for 8-12 hours per day and to lift 25 pounds several times per day. At the time of the hearing Claimant was 46 years old. He has a high school education.

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor*

v. Evans & Gambrel Co., 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

The record does not contain any narrative opinion finding that Claimant is totally disabled. In fact, Drs. Baker, Burki, and Hussain all found that Claimant retained the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. Their opinions were based on clinical examinations of Claimant, as well as PFTs and ABGs. They considered accurate accounts of Claimant's non-smoking history and his coal mine employment history. Their opinions set forth clinical observations and findings, and their reasoning was supported by adequate data. The opinions of Drs. Baker, Burki, and Hussain were reasoned and documented regarding the absence of total disability. I attribute probative weight to their opinions. I find that Claimant retains the respiratory capacity to perform his usual coal mine employment as a heavy equipment operator. Claimant has not established total disability under subsection (b)(2)(iv).

Claimant has failed to establish the existence of total disability under any applicable subsection of § 718.204(b). I find that Claimant does not suffer from a totally disabling respiratory or pulmonary impairment.

Entitlement

The Claimant, Tillman Brock, has failed to prove, by a preponderance of the evidence, that he suffers from pneumoconiosis and he has failed to prove that he suffers from a totally disabling respiratory or pulmonary impairment. Therefore, Mr. Brock is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of Tillman Brock for benefits under the Act is hereby DENIED.

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THOMAS F. PHALEN, JR.

Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. **A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.**